



Original: **French**

No.: **ICC-01/04-01/07**

Date: **17 March 2009**

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

Public redacted version

**Third review of the decision on the application for interim release of Mathieu
Ngudjolo (rule 118(2) of the *Rules of Procedure and Evidence*)**

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Ms Silvana Arbia

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Mr Anders Backman

**Victims Participation and Reparations
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Other

In accordance with articles 21(3), 58, 60, 61 and 64(6)(a) of the *Rome Statute* (“the Statute”), Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively) issues the following decision.

I. Background

1. On 19 November 2009, pursuant to article 60(3) of the Statute and rule 118(2) of the *Rules of Procedure and Evidence* (“the Rules”),¹ the Chamber conducted a second review² of the decision denying the interim release of Mathieu Ngudjolo Chui issued on 27 March 2008 by the Single Judge Akua Kuenyehia (“the Decision of 27 March 2008”).³

2. That decision, issued in the pre-trial stage, was supported by the following facts: 1) the condition set forth in article 58(1)(a) of the Statute continued to be fulfilled insofar as there were still reasonable grounds to believe that Mathieu Ngudjolo Chui committed crimes within the jurisdiction of the Court; 2) the gravity of the crimes contained in the warrant of arrest for Mathieu Ngudjolo Chui⁴ and the possibility of a long prison sentence created a risk that the accused may wish to abscond from the jurisdiction of the Court; 3) Mathieu Ngudjolo Chui had escaped from Makala prison in the DRC before a verdict was reached by a military tribunal in Kinshasa on war crimes allegedly committed in the town of Tchomia in May 2003 for which he was charged in the Democratic Republic of the Congo (“the DRC”); 4) there were also reasonable grounds to believe that Mathieu Ngudjolo Chui was the highest ranking commander of the *Front des nationalistes et intégrationnistes* (FNI) in the Zombe area during the relevant period; it further appeared that he still wielded

¹ *Decision Inviting Observations from the Participants concerning the Detention of Mathieu Ngudjolo Chui (rule 118(2))*, 30 October 2008, ICC-01/04-01/07-732-tENG, p. 3.

² “Second Review of the *Decision on the Application for Interim Release of Mathieu Ngudjolo (rule 118(2) of the Rules of Procedure and Evidence)*”, 19 November 2008, ICC-01/04-01/07-750-tENG.

³ Pre-Trial Chamber I, *Decision on the Application for Interim Release of Mathieu Ngudjolo Chui*, 27 March 2008, ICC-01/04-01/07-345.

⁴ Pre-Trial Chamber I, “Warrant of Arrest for Mathieu Ngudjolo Chui”, 6 July 2007, ICC-01/04-01/07-1-tENG.

influence as a powerful figure within the DRC and, in this capacity, had established numerous contacts nationally and internationally, which could provide him with the connections and means to flee. In the view of the Single Judge, the supporters of Mathieu Ngudjolo Chui had the capability to interfere with ongoing and further Prosecution investigations and/or Prosecution witnesses, victims and members of their families. Moreover, there were several precedents of interference with Prosecution witnesses.

3. On 2 April 2008, Mathieu Ngudjolo Chui's Defence lodged an appeal⁵ against the decision of the Single Judge. On 9 June 2008, the Appeals Chamber upheld the decision.

4. On 18 February 2009, in view of the third review of the decision, the Chamber sought the observations of the participants,⁶ all of whom responded on 24 February 2009.⁷ Mathieu Ngudjolo's Defence filed its response on 2 March 2009.⁸ On 3 March 2009, pursuant to rule 118(3) of the Rules, the Chamber held a public hearing where the parties expanded on their arguments.⁹ During that hearing, Mathieu Ngudjolo's Defence stated that that the accused's release was essential and that the Chamber

⁵ Mathieu Ngudjolo Chui's Defence Team, "Notice of Defence Appeal against the Decision on the Application for Interim Release of Mr Ngudjolo", 2 April 2008, ICC-01/04-01/07-356-tENG.

⁶ *Décision aux fins de recueillir les observations des participants sur la détention de Mathieu Ngudjolo Chui (règle 118-2)*, 18 February 2009, ICC-01/04-01/07-904.

⁷ Legal Representatives of Victims a/0333/07 and a/0110/08, "*Observations des victimes a/0333/07 et a/0110/08 sur la détention de Mathieu Ngudjolo Chui (Règle 118-2)*", 24 February 2009, ICC-01/04-01/07-922; Legal Representatives of Victims a/0330/07 and a/0331/07, "*Observations des représentants légaux des victimes a/0330/07 et a/0331/07 sur la détention de Mathieu Ngudjolo Chui (Règle 118-2)*", 24 February 2009, ICC-01/04-01/07-923; "*Observations des représentants légaux de victimes sur la détention préventive de M. Mathieu Ngudjolo Chui (Règle 118-2)*", 24 February 2009, ICC-01/04-01/07-924; Office of the Prosecutor, "Prosecution's Observations on the Review of the Pre-trial Detention of Mathieu Ngudjolo Chui", 24 February 2009, ICC-01/04-01/07-927.

⁸ Mathieu Ngudjolo Chui's Defence Team, "*Observations de la Défense en réponse à celles du procureur et des représentants légaux des victimes relativement à la détention préventive de Monsieur Mathieu Ngudjolo Chui*", 2 March 2009, ICC-01/04-01/07-935.

⁹ ICC-01/04-01/07-T-61-ENG CT WT 03-03-2009.

could arrange it on a discretionary basis by establishing specific conditions, even if the accused was released in the DRC.¹⁰

II. Third review by the Chamber of the Decision of 27 March 2008

5. In compliance with the judgment issued by the Appeals Chamber on 13 February 2007,¹¹ the Chamber has conducted the review provided for under article 60(3) of the Statute and rule 118(2) of the Rules and the review provided for under article 60(4) of the Statute.

1) Review pursuant to article 60(3) of the Statute and rule 118(2) of the Rules

6. Under article 60(3) of the Statute, on reviewing a decision on interim release, the Chamber may modify its ruling if it is satisfied that changed circumstances so require.

7. According to Mathieu Ngudjolo's Defence, neither the Prosecutor nor the victims' representatives have submitted new or conclusive arguments in support of the accused's continued detention.¹² At the hearing, it pointed out that, contrary to what the Prosecutor had stated,¹³ the accused had never escaped from Makala prison in the DRC.¹⁴ It also argued that the seriousness of the charges does not constitute a criterion to deny a detained person interim release.¹⁵ Furthermore, it stressed that there is currently no substantive evidence proving that Mathieu Ngudjolo might, if released, endanger the security of persons whose identity was disclosed within the evidence disclosure process.¹⁶ According to the Defence, the accused currently does

¹⁰ ICC-01/04-01/07-T-61-ENG CT WT 03-03-2009, p. 23, line 16 to p. 24, line 11.

¹¹ Appeals Chamber, *Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"*, 13 February 2007, ICC-01/04-01/06-824, para. 120.

¹² ICC-01/04-01/07-935, para. 4.

¹³ ICC-01/04-01/07-T-61-ENG CT WT 03-03-2009, p. 6, line 15 to p. 7, line 1.

¹⁴ ICC-01/04-01/07-T-61-ENG CT WT 03-03-2009, p. 19, lines 11 to 21.

¹⁵ ICC-01/04-01/07-T-61-ENG CT WT 03-03-2009, p. 20, lines 15 to 16.

¹⁶ ICC-01/04-01/07-T-61-ENG CT WT 03-03-2009, p. 21, lines 3 to 8.

not wield any influence in the DRC and has never had any personal or privileged relations with the Congolese authorities.¹⁷

8. However, the Chamber considers that there has been no marked change in the circumstances here, for the following reasons. Although Mathieu Ngudjolo's Defence intended to put this aspect of the case into perspective,¹⁸ the situation in the DRC, and in Ituri in particular, remains unstable and, under such circumstances, releasing the accused would only compromise the safety of the victims and witnesses whose identity has been disclosed, and would thus impede the smooth running of the proceedings. Furthermore, the guarantees that the accused will appear if released, whether in the DRC or the Netherlands, remain insufficient, given the seriousness of the crimes for which he will have to answer and the length of the sentences he may incur. In this respect, the Chamber has already indicated that the seriousness of the crimes cannot in itself warrant release being denied, but it must again recall that, although there are other assessment criteria, this is one which cannot be underestimated. Moreover, the proximity to the commencement of the hearings on the merits makes Mathieu Ngudjolo's continued detention all the more necessary.

9. [REDACTED]

2) Review pursuant to article 60(4) of the Statute

10. Under article 60(4) of the Statute, the Chamber "shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor". The Appeals Chamber confirmed in its judgment that "the unreasonableness of any period of detention prior to trial cannot be determined in the abstract, but has to be determined on the basis of the circumstances of each case".¹⁹ In order to determine whether or not the period of Mathieu Ngudjolo's

¹⁷ ICC-01/04-01/07-T-61-ENG CT WT 03-03-2009, p. 22, line 23 to p. 23, line 3.

¹⁸ ICC-01/04-01/07-T-61-ENG CT WT 03-03-2009, p. 20, line 24 to p. 21, line 8.

¹⁹ ICC-01/04-01/06-824, para. 122.

detention prior to trial is unreasonable, the Chamber must therefore take account of all of the circumstances of the case at hand.

11. As Pre-Trial Chamber I recalled in *The Prosecutor v. Thomas Lubanga Dyilo*, to assess the reasonableness of detention, it must determine whether the requirement of public interest shall outweigh the rule of respect for individual liberty.²⁰ In this matter, as it explained above, the Chamber considers that the general interest requires Mathieu Ngudjolo's continued detention, in light of the absolute necessity to guarantee his appearance at trial and to ensure the protection of the victims and witnesses.

12. Since the first status conference which was held on 27 and 28 November 2008,²¹ the Chamber has been actively preparing the trial. Although it has thus far considered that it is unable to set a definitive date for the trial, it has endeavoured to take all measures to ensure the expeditious conduct of the proceedings pursuant to article 64 of the Statute. To this end, it has required the participants to file many submissions and, with particular regard to disclosure of incriminating and exculpatory evidence, procedures for redactions and agreements entered into under article 54(3)(e) of the Statute, it has requested that the Prosecutor make a special effort to assist in resolving all pre-trial issues as soon as possible. Mathieu Ngudjolo Chui cannot, therefore, be considered to have been detained for an unreasonable period and, in this instance, there is no inexcusable delay by the Prosecutor within the meaning of article 60(4) of the Statute.

²⁰ Pre-Trial Chamber I, "Second Review of the *Decision on the Application for Interim Release of Thomas Lubanga Dyilo*", 11 June 2007, ICC-01/04-01/06-924; European Court of Human Rights (ECHR), *W. v. Switzerland*, Judgment of 27 June 1993, Application no. 14379/88, para. 30; ECHR, *Ilijkov v. Bulgaria*, Judgment of 26 July 2001, Application no. 33977/96, para. 84.

²¹ *Ordonnance fixant la date d'une conférence de mise en état (règle 132 du Règlement de procédure et de preuve)*, 6 November 2008, ICC-01/04-01/07-739.

FOR THESE REASONS,

The Chamber **REJECTS** the application for release submitted by the Defence in its observations and **DECIDES** that Mathieu Ngudjolo shall remain in detention.

Done in English and in French, the French version being authoritative.

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Fumiko Saiga

Dated this 17 March 2009,

At The Hague, The Netherlands